In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 441

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. duP. BAYARD, RECEIVER,
Petitioners,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,
Respondents.

Petition for Rehearing of Denial of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

On December 7, 1953 the Court denied a petition for writ of certiorari. Petitioner prays that this denial be reconsidered and that the petition for writ of certiorari be granted. This petition for rehearing is confined to one substantial ground available to petitioner but not previously presented in the petition for certiorari. Supreme Court Rule 33, subd. (2).*

*This new ground falls within the scope of some of the "questions presented" in the petition for certiorari, particularly question No. 1.

REASON FOR GRANTING THIS PETITION FOR REHEARING AND FOR GRANTING WRIT.

Involved in this case is the disposition of a trust fund of $3,385,290 deposited in the registry of the District Court by *petitioner* and awaiting disposition.

The case presents the following situation not called to this Court's attention in the petition for certiorari:

On a claim for refund filed in the name of a former parent corporation to recover taxes paid under a consolidated return, seeking to apply certain tax credits of the parent, the United States Government makes payment of a refund and does so to the one and only party whom it can recognize under the federal tax laws and regulations, viz., the parent, petitioner here. Then in a suit brought by the former parent against a former subsidiary, the parent deposits the sum in a United States District Court as part of its application for instructions, and that court not only denies the parent a right to an accounting of certain other tax savings, which are in the possession of the subsidiary, *but it also compels the parent, who had received the tax refund from the Government, to pay that money to the former subsidiary,* the respondent. The Court of Appeals sustains this command under the view that the tax laws of the United States so require.

The petition for certiorari addressed itself to the denial of relief to petitioner with respect to the tax savings in respondent's possession. The ground now presented relates to an order which compels petitioner to pay to respondent a sum of money which the Government paid to petitioner and under no circumstances would or could have paid to respondent.

The facts under which this situation arises are briefly these.

The total tax savings in this case, amounting to $21 million, in round figures, arose in *two* ways. (1) Respondent paid no tax for the years 1943 and 1944, the returns reporting none due by virtue of petitioner's loss. This accounted for roughly $17 million. (2) A tax of roughly $4 million had been paid for 1942 (R. 266). Then in March 1945, nearly one year after affiliation between petitioner and respondent had ceased (not only actually but also

technically), and 2½ months after respondent was out of the hands of the Reorganization Trustees, a claim for refund was filed with the Treasury to recover this sum (R. 266, 1656). The foundation of the claim was the use, as a carry-back, of an unused portion of petitioner's same loss. This claim for refund was filed *in petitioner's name*, not respondent's (R. 1654). It *had* to be so filed, because under the federal tax laws and regulations a claim for refund of taxes paid under a consolidated return can be made only by the parent and may not be made by the subsidiary. Similarly, where a refund is granted, it is paid to the parent, it may be paid to no one else, and the Government recognizes only the parent. Treasury Regulation 104, Section 23.16a provided, *inter alia*, that

> "refunds must be made directly to and in the name of the common parent and will discharge any liability of the Government in respect thereof to any such [i.e., affiliated] corporation."

This suit was instituted in October 1946, ten months before the tax controversy was settled with the Government. The complaint asked for an accounting of the tax savings in respondent's possession and also tendered to the court, for adjudication, any moneys petitioner might thereafter receive from the Government on the claim for refund (R. 10). Respondent counterclaimed for a prohibitory injunction enjoining petitioner from receiving for itself any moneys it might get under the claim of refund and for a mandatory injunction commanding petitioner to endorse and to deliver to respondent all checks it should receive from the U. S. Treasury and for an order quieting title in respondent to any refund (R. 34, 35).

Thereafter respondent's tax counsel proposed to the Government a settlement whereby the claim for refund would be waived and the returns for 1943 and 1944 would be accepted as filed, showing no tax due (R. 1662). Since the Government recognizes only the parent, respondent's counsel had to obtain a power of attorney from petitioner to affirm the offer in its name. He pre-

pared and obtained such a power from petitioner's president, Curry, who signed it without consulting his Board of Directors, because respondent's counsel told him that he wanted it (R. 1784, 668).

In April 1947 respondent's counsel first requested petitioner's approval of the offer of settlement, and thereby petitioner's board learned of the power of attorney (R. 1787, 1788). The board replied by letter, saying (R. 1796):

> "Inasmuch as in the proposed settlement the Railroad Corporation [petitioner] foregoes *its* refund claim of $4,200,000, we think it appropriate that a stipulation promptly be entered into between the Railroad Company [respondent] and the Railroad Corporation, and the other members of the Group, which will insure the Corporation its day in court for a settlement of the questions of proper and equitable allocations of tax savings, if any, as well as fixing the amount of the refund as the basis for such savings."

Petitioner and respondent thereupon negotiated for a stipulation as a condition to approval by petitioner of the settlement offer. A stipulation was prepared. But at that point certain intervening stockholders of petitioner (petitioners in No. 463 herein) applied to the District Court in this case for an order enjoining the parties from settling the tax controversy with the Government on the proposed basis (R. 335). There was no objection to a settlement whereby the tax savings would be $17 million instead of $21 million. But a refund, if paid, would come to petitioner as the only party to whom the Government would or could make the payment, whereas the form of the proposed settlement was such that it waived the refund and left respondent in possession of all the tax savings, instead of diminishing all elements of the claimed savings by 4/21sts. The fact of possession might become crucial.

After discussion in open court on August 25 and 26, 1947, on the application for the injunction (R. 335-399), it was made clear that the proposed stipulation was intended to mean that the tax settlement with the Government should be regarded as one not abandoning the refund claim but as allowing and paying it

proportionately, and it was agreed that it should be so construed (R. 390). The court made *its formal pre-trial order* that it should be so regarded, and on that condition it denied the restraining order (R. 163), and the stipulation was executed and filed (R. 168). The order provided that the court shall "determine the issues and give judgment herein, in the same manner as if said tax savings had been allowed and said refund claim allowed and paid by the United States Government in the ordinary course and manner prescribed by law and as proportionately reduced by said settlement" (R. 166).

In reliance on this stipulation and pre-trial order which established the predicate on which the case was to proceed, the tax settlement was allowed to occur. The effect of the pre-trial order and stipulation was to regard respondent as having paid to the U. S. Treasury 4/21sts of $17 million as taxes due and owing for 1943-44 and to treat 17/21sts of the $4 million involved in the claim of refund—to be exact, the sum of $3,385,290—as having been paid by the Government *to the petitioner* and by it paid into court to await judgment.

This matter was briefly covered in the dissenting opinion of Judge Fee in the Court below:

> "The stipulation of the parties was that a fund was paid into Court by plaintiff and therefore it must be returned to plaintiff's possession, unless some affirmative proof showed defendant was entitled thereto. * * * the Trial Court affirmatively awarded this to defendant. But no findings to sustain affirmative award are present." (Fn. 19, R. 2253).

Further (R. 2246):

> "By the stipulation, plaintiff 'as agent' was trustee of an express trust and, as such, had a right to deposit the fund and ask for a determination of the rights of all parties thereto, as in the nature of interpleader. Plaintiff affirmatively demanded findings upon this feature, and the Trial Judge refused to make them. [*] A stipulation of parties to litigation that a

*See R. 439-444. This footnote added by us.

fund is deposited in court is sufficient. The Court must give affirmative directions that the fund be paid to the proper party.[20] Before such a judgment be entered, findings of fact are required. It is assigned as error that the Trial Judge refused to make findings on this point. The rule requires findings of fact. This is error requiring reversal. The judgment here against plaintiff did not end the case. According to the very record before us, there is still a fund in the Trial Court which has not been distributed.

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[20]Rule 67, Federal Rules of Civil Procedure; 28 U.S.C.A., Secs. 2041, 2042; Georgia vs. Madrazo, 26 U.S. 110, 121; United States vs. Morgan, 307 U.S. 183, 193; Osborn vs. United States, 91 U.S. 474, 479." [This footnote is part of the opinion, appearing at R. 2253]

CONCLUSION

There are literally thousands of consolidated returns filed each year, and refunds are paid by the Government to the parent corporation thereunder. The decision below will throw intercorporate accounting into confusion.

We respectfully submit that the petition for rehearing should be granted.

Dated: San Francisco, California
December 17, 1953.

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Of Counsel:
BROBECK, PHLEGER & HARRISON

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and that it is restricted to grounds specified in Rule 33 of the Rules of this Court.

December 17, 1953.

MOSES LASKY
Attorney for Petitioner.

Office - Supreme Court, U. S.
FILED
DEC 23 1953
HAROLD B. WILLEY, Clerk

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THE WESTERN PACIFIC RAILROAD CORPORATION and ALLEN L. DU P. BAYARD, Receiver,
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Respondents' Response to Petition for Rehearing of Denial of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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The petition for rehearing does not, for many reasons, justify or require a grant of certiorari which the Court has already denied.

First. The petition is not within the purpose or intent of Rule 33(2). It seeks to bring forward not a new ground in support of the petition for certiorari, but a new question for consideration by the Court, a question which the petition for certiorari does not present. See "Questions Presented," pages 2 and 3 of the petition for certiorari and compare the petitioners' statement of "points on which they intend to rely" in the Court of Appeals (R. 2168-72, particularly point 9, R. 2170). The Court will not consider questions other than those presented in the petition.

United States v. Penn Mfg. Co., 337 U.S. 198, 205, n. 1;

Nat'l Licorice Co. v. Labor Board, 309 U.S. 350, 357, n. 2;

General Talking Pictures Co. v. Western Electric Co., 304 U.S. 175, 177;

Washington Coach Co. v. Labor Board, 301 U.S. 142, 146.

Second. The petition raises no question of federal law, it does not suggest a conflict with a decision of another Court of Appeals, nor is it directed to a matter of any public importance (Rule 38(5)). The meaning and effect of a particular stipulation in a particular case is hardly a matter with which this Court should concern itself. The Court has said repeatedly that it will not on certiorari consider matters of interest only to the parties. See, for instance, *N.L.R.B. v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502.

Third. There is nothing left undone or undisposed of by the courts below. By express provision of the stipulation (R. 169) no money was actually paid into court and the judgment of the District Court (R. 324), affirmed on appeal (R. 2255), fully disposes of the litigation.

Fourth. The argument petitioner seeks to present here was presented in both courts below and by both rejected. See the record in the trial court (R. 277-83, 319, 419, 429-32, 453) and the opinion of the Court of Appeals (R. 2214, 2235-7), particularly the following excerpt:

> "The stipulation and pre-trial order were entered into and made for the purpose of protecting the position of Corporation in relation to the refund claims *only* if it should be found entitled to the refund. *The court found*

it was not entitled to it. Appellants' position is no stronger with respect to the refund for 1942 taxes paid by the subsidiaries than it is with respect to the 1943 and 1944 savings of the subsidiaries." (R. 2237; emphasis as reported at 197 F.2d 1006)

This seems plainly correct—which perhaps accounts for the fact that petitioners did not see fit to advance their present contention in seeking a rehearing in the Court of Appeals or when the case was before this Court last term.

The petition for rehearing should be denied.

Dated: December 23, 1953.

Respectfully submitted,

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